

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)

Implementation of the Local)

Competition Provisions in the)

Telecommunications Act of 1996)

(Access to Rights-of-Way))

CC Docket No. 96-98

**JOINT REPLY COMMENTS OF
UTC
AND THE
EDISON ELECTRIC INSTITUTE**

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Reply Comments of UTC/EEI
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SUMMARY

The primary business of electric-utility facility-owners is the provision of electric service to the public. Not only is system safety and reliability paramount, but utilities have economic and legal obligations to customers, and shareholders, to provide adequate and efficient electric service at a reasonable cost, earning at least a reasonable profit. Any activity required of a utility by government can only be imposed if the utility is compensated for the resulting costs incurred, to the full extent of such costs. Such full compensation includes an opportunity to earn a reasonable return on any investment used to conduct that activity, whether such investment is in physical plant or in labor, as opposed to some other activity furthering the purposes of the utility. Failure to allow for the full recovery of costs, including the opportunity to earn a profit, would be an unconstitutional taking of property without full compensation.

For instance, space reserved by a facility owner for its future use is its own property. Any attempt to obtain access to such space for any purpose not the facility owner's must recognize that preexisting proprietary interest. Similarly, those who request access must bear the burden of demonstrating that the requested access is reasonable (such as by obtaining all necessary permits and approvals, demonstrating compliance with relevant engineering and safety standards, using properly trained workers, etc.), and denials of access requests should be presumed reasonable absent such a *prima facie* showing of reasonability. As we stated in our initial comments, the Act requires nondiscriminatory access — it does not mandate unconditional access.¹

¹ See *Bell Atlantic Telephone v. FCC*, 24 F.3d 1441, 1447 (D.C. Cir. 1994).

Moreover, as we also stated in our initial comments, such reserved space may be required for the facility owner's use sooner than the attaching entity is willing to move or otherwise release such space. Therefore, any access to reserved space must be subject to the facility owner's planned use, and must include an obligation on the part of the attaching entity to pay for the full cost of all required relocation, including any additional facility that may be required as a result, at such time as the facility owner requires that future use.² This is, in fact, the practice currently reflected in most existing attachment contracts, and follows the long-recognized principle of regulatory law that those who impose costs must bear the responsibility for those costs.

In addition to the rights of facility owners, there are other rights superior to the desires of attaching entities. For instance, the existence of prior attaching entities does not automatically imply that additional attachments are possible. Moreover, a facility owner cannot grant more access than it has, such as by unilaterally modifying the terms of an easement or granting access to the private facility of other entities. Thus, the Commission simply has no authority to require facility owners to provide access in contravention of existing law or agreements.

Neither may the Commission prevent facility owners from modifying their facilities as necessary for their corporate purposes, require them to construct new facilities, or require them to provide access to a facility which is not a "pole, duct or conduit" as understood and used by the industry at least since passage of the 1978 Pole

² See *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 426 (1982).

Attachment Act. Moreover, the Act does not confer upon the Commission any authority to void existing attachment contracts or other agreements, whether as to rates, terms, or conditions. Indeed, the new Act and its legislative history indicate that parties are expected to negotiate rates, terms and conditions for access. The Act also does not grant the Commission the authority to otherwise control the rates, terms, or conditions of facility access in general — only for those entities specified in the Act.

Finally, several commenters have made broad allegations that facility owners, including electric utilities, are "stonewalling" requests for attachments or otherwise acting inappropriately, such as by attempting to impose unreasonably charges for access to utility property. Such allegations are unfounded, in our belief, and certainly they are completely unsupported. Unsupported and unspecific allegations of improper or inappropriate activity should not become the basis for regulations imposed upon electric utilities.

Rather, if an entity seeking facility access believes that it is being or has been treated unfairly, it should file a complaint with the Commission (or appropriate state regulatory body) to obtain redress of its particular grievance. We would expect no less to be demanded by attaching entities, were utilities to make similar charges regarding excessive or otherwise inappropriate access requests. In fact, utilities actually have been burdened by many demonstrable instances where attaching entities have behaved improperly, including violations of safety or other engineering standards, and failures to inform the facility owner of new attachments or of modifications or additions to existing attachments.

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Pursuant to Section 1.415 of the Commission's Rules, UTC, The Telecommunications Association (UTC),³ and the Edison Electric Institute (EEI) hereby submit their Joint Reply Comments on the issues raised at paragraphs 220-225 of the *Notice of Proposed Rulemaking*, FCC 96-182, released April 19, 1996 (*NPRM*), relating to access to rights-of-way by telecommunications service providers.

UTC, the national representative on communications matters for the nation's electric, gas and water utilities and natural gas pipelines, and EEI, the association of the United States investor-owned electric utilities and industry associates worldwide, filed extensive Joint Comments in this proceeding. The Joint Comments focused on the direct impact that the Commission's interpretation and implementation of the Pole Attachment Act, 47 U.S.C. Section 224, as amended by the Telecommunications Act of 1996, will have on the country's investor-owned electric utility industry.⁴

³ UTC was formerly known as the Utilities Telecommunications Council.

⁴ While the Joint Comments primarily addressed attachments to electric utility facilities the same considerations should apply to the protection of gas utility facilities.

The UTC and EEI Joint Comments stressed that in implementing the amendments to Section 224 the FCC must recognize that utilities design, own and maintain poles and other distribution facilities as an integral part of their obligation to provide reliable, safe and affordable electric service to the public, and that third-party telecommunications attachments to utility facilities are an incidental use that should not be allowed in any way to undermine or detract from the primary purpose of these facilities.

In addressing the issues raised by the FCC related to access to utility poles, ducts and conduits, the Joint Comments noted the diversity of individual utility and attaching-entity circumstances, and indicated that it is highly impractical to attempt to prescribe one set of rigid uniform regulations for all potential future attachment situations.

Accordingly, UTC and EEI indicated that the most productive approach for the Commission to take at this time is to address procedures for resolving disputes. Below, UTC and EEI again address these issues in the context of the other comments filed in this proceeding.

I. Commenters Urge Flexible Guidelines and Reliance On Individual Negotiations

The FCC has adopted the current *NPRM* to implement the local competition provisions contained in Section 251 of the Telecommunications Act of 1996. Section 251(b)(4) imposes upon Local Exchange Carriers the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224" (the Pole Attachment Act as amended by the 1996 Act). Specifically, the

FCC seeks input on the proper interpretation and implementation of new section 224(f) related to mandatory access, and the conditions under which access may be denied, and section 224(h) related to notification of modifications requiring access.

While the primary context of the proceeding is local telephone competition, the adoption of regulations implementing section 224 also applies to the poles, ducts, conduits and right-of-way owned by investor owned utilities. As a result, the FCC must take particular care not to adopt rules that could impair reliable and safe utility service. As noted by the Public Service Company of New Mexico (NMPS), the FCC must recognize its own inexperience in regulating any substantive aspect of the electric power industry. While the FCC has regulated pole attachment rates for many years, regulating rates is fundamentally different than imposing the potentially broader and more intrusive regulations at issue in this proceeding, which may directly and substantively affect the reliability of electric service to the public.⁵

The vast majority of commenters echoed the Joint Comments of UTC and EEI that it is impractical and inappropriate for the FCC to attempt to create rigid, uniform rules that predefine conditions and terms related to access.⁶ The myriad fact patterns and attachment scenarios, illustrated in the various comments, should clearly demonstrate that pole attachments are uniquely local in nature and present differing, often novel circumstances which defy standardization. As US West notes, any attempt by the

⁵ NMPS, p. 10.

⁶ See comments of : Ameritech, Bell Atlantic, BellSouth, CBT, GTE, Infrastructure Owners, New England Electric, Nynex, Ohio Edison, Pacific Telesis, Puget Power, RTC, US West, Virginia Power, and Western Alliance.

Commission to articulate and implement detailed national standards on use of poles, conduits and rights-of-way would be futile.⁷ Pacific Telesis states that the FCC need not promulgate detailed rules to implement these sections, but rather should limit its actions to establishing guidelines.⁸

The need for case-by-case review was even noted by the FCC when it implemented the original provisions of the Pole Attachment Act of 1978. In its First Report and Order in CC Docket No. 78-144, 68 FCC 2d 1585, 1590 (1978), the FCC stated that it was --

“...adopting few substantive guidelines with respect to non-rate related terms and conditions of pole attachment agreements. Instead, we believe we should initially respond on a case-by-case basis to complaints containing such issues with a view toward adopting appropriate substantive guidelines after we have obtained more experience in this area.”

Even after ten years of experience in reviewing pole attachment matters, the FCC remained convinced that it was impractical to legislate in advance all of the factors that could be involved in a pole attachment agreement:

“It is not only difficult, but also might well be impossible, to identify in advance all specific types of contract terms and conditions that are unjust or unreasonable since that determination cannot be made in isolation of its factual scenario. Each pole attachment agreement has its own set of cost data, engineering requirements and terms and conditions, the interrelationship of which determines whether a particular term or condition is onerous. A term or condition which could be found onerous when taken in the context of one particular agreement may be determined

⁷ US West, p. 13.

⁸ Pacific Telesis, p. 18.

to be just and reasonable when examined in the context of another pole attachment agreement.”

The FCC further noted that making such determinations on a case-by-case basis will not result in unreasonable discrimination and inconsistency, but is the approach by which an agency typically establishes precedents and adjudicates controversies between individual parties. Memorandum Opinion and Order on Reconsideration in CC Docket No. 86-212, 4 FCC Rcd 468, 471 (1989). Likewise, it would impractical, and probably impossible, to determine in advance whether given practices are unreasonably discriminatory.

Some cable companies⁹ and competitive access providers (CAPs)¹⁰ have requested the FCC to adopt detailed and mandatory access requirements with no room for variation or individual negotiations. However, there is absolutely no basis within the Act or its legislative history to suggest that Congress intended to limit the ability of parties to negotiate terms and conditions of access. To the contrary, Section 224(e)(1) indicates that the parties are to resort to the FCC when they are unable to resolve a dispute, thus implying that they are to first attempt to negotiate the rates, terms and conditions for access.¹¹ As Ameritech points out, in deciding the level of detail to incorporate into its rules, the Commission should ensure that it does not usurp meaningful negotiations or

⁹ Joint Cable Comments

¹⁰ Nextlink

¹¹ The House/Senate Conference Report that accompanied S.652, the Telecommunications Act of 1996, specifically stated that the “conference agreement amends section 224 of the Communications Act by adding new section (e)(1) to allow parties to negotiate rates, terms, and conditions, for attaching to poles, ducts, conduits and rights-of-way owned or controlled by utilities.” Conference Report, No. 104-458, at 205.

lose sight of the fact that the ultimate purpose of the 1996 Act is to effectuate the transition from regulation to competition. Complicated and inflexible national rules will delay achievement of that goal.¹²

Moreover, there is no statutory support for the suggestions by ALTS and ACSI that pole attachment agreements executed prior to the adoption of the 1996 Act should be voided or reopened under the new rule.¹³ The amended pole attachment provisions do not in any way suggest that the new rules are intended to abrogate existing agreements. In fact, section 224(d)(3) specifically indicates that parties subject to existing agreements remain bound by those agreements and are not entitled to the interim rate formula. Consistent with Congressional intent, UTC and EEI agree with the Infrastructure Owners that the FCC's rules must recognize that the pole attachment provisions of the 1996 Act apply only to new agreements, entered after the effective date of the Act, and do not reach existing pole attachment contracts between utilities and cable companies or telecommunications service providers.¹⁴

Finally, whatever regulations the FCC adopts in this proceeding should clearly indicate that mutual agreement and negotiation must be earnestly pursued by both parties prior to initiation of complaint proceedings.¹⁵ The establishment of a requirement for

¹² Ameritech, Summary.

¹³ ALTS, p. 7; and p. ACSI, p. 8.

¹⁴ Infrastructure Owners, p. 16.

¹⁵ The FCC has previously noted that based on its experience in adjudicating pole attachment complaints and monitoring negotiations, most utilities engage in good faith negotiations, and that it is in the best interest of both the utility and the attaching entity to resolve disputes without resorting to filing complaint with the FCC, *Memorandum Opinion and Order on Reconsideration*, in CC Docket No. 86-212, 4 FCC Rcd 468,472 and n.71.

good faith negotiation would not only comport with the underlying deregulatory nature of the Telecommunications Act but would also recognize the impracticality of attempting to craft and enforce uniform standards related to pole attachments.

II. Commenters Agree That Mandatory Access Would Constitute An Unconstitutional Taking

In their Joint Comments, UTC and EEI expressed reservations with the Commission's tentative conclusion, that the Act as amended requires all facility owners to provide access to such entities as telecommunications carriers or cable television systems. The Joint Commenters noted that this conclusion, whether or not an accurate interpretation of the Act, raises serious constitutional questions, regarding at least, the taking of property without just compensation. A number of other commenting parties expressed similar concerns regarding the mandatory nature of the access requirement.¹⁶ As the Infrastructure Owners note, mandating access to the private property of utilities constitutes a permanent physical occupation which denies the owner of the economic benefit and value of its private property.¹⁷

In discussing the issues related to access in the subsequent sections, neither UTC or EEI concede that the Commission has correctly interpreted the Act regarding access, or that this provision is constitutional.¹⁸

¹⁶ BellSouth, p. 14; CBT, p. 10; GTE, pp. 23-24; Infrastructure Owners, pp. 7-10; NMPS, pp. 20-21; Puget Power, p. 3; RTC, p. 14; US West, pp. 13-14, Virginia Power, p. 4.

¹⁷ Infrastructure Owners, p. 10.

¹⁸ See, *Bell Atlantic Telephone v. FCC*, 24 F 3d 1441, 1447 (D.C. Cir. 1994).

III. "Non-Discriminatory Access"—Section 224(f)

In the *NPRM*, the FCC inquired as to the extent to which the 224(f) “non-discriminatory access” provision compels a LEC to provide access to poles, ducts, conduits, and rights-of-way on similar terms to all requesting telecommunications carriers, and whether those terms must be the same as the carrier applies to itself or an affiliate for similar uses. In responding to this inquiry, UTC and EEI expressed the need for the FCC to distinguish between the operational and policy implications of requiring non-discriminatory access to LEC facilities and requiring non-discriminatory access to electric utility facilities. The importance of making this distinction is underscored by the comments of parties such as MCI, MFS and Sprint which speak almost exclusively in terms of providing non-discriminatory access to LEC facilities.

Without addressing the merits of these parties’ comments with respect to attachments to LEC facilities, it is clearly inappropriate to require an electric utility or its non-telecommunications affiliates to comply with the same terms and conditions of access to its facilities as the utility requires of entities making attachments for telecommunications services. It would infringe on the facility owner’s property interests and could interfere with the utility’s provision of electric service to the public.¹⁹

NMPS notes that a requirement for common terms and conditions is unnecessary with respect to the electric utility itself. For instance, terms and conditions that might be

¹⁹ NMPS, p. 16. Congress was well-aware of the differences between attachments to electric utility facilities and LEC-owned facilities when it included specific provisions for denial of access to electric utility facilities in Section 224(f)(2).

applied to a telecommunications carrier may involve identification of the telecommunications facilities to be attached to a pole. This information enables the pole owner to do a structural analysis to ensure that the pole can support the projected load. This may include an analysis of equipment with which electric utility engineers are unfamiliar, and time must be provided to permit that analysis to be accurately completed. On the other hand, the types and amounts of structural loads of power utility equipment is well known to electric utility engineers, with the pole itself having been selected in order to support these utility facilities. Differing terms and conditions should also be applied to telecommunications carriers to enable the electric utility to ascertain that sufficient usable space is available on particular poles for a desired telecommunications attachment.²⁰ Accordingly, the FCC should recognize the legitimate distinctions, as to the nature and extent of appropriate terms and conditions applicable to electric utilities as pole owners and LECs as pole owners and not adopt regulations which effectively disregard these distinctions, thereby limiting the ability of electric utility pole owners to make attachments to their own poles.

Further, UTC and EEI reiterate that the question of reasonable *versus* unreasonable discrimination must be held to an analysis of particular facts, based on a reasonable interpretation of all permissible-use, engineering and safety standards, regulations, and other requirements applicable to the particular situation at hand. There are simply too many case-specific questions regarding such matters as clearance

²⁰ NMPS, p. 17.

requirements, local franchises, ordinances, and regulations, land-use requirements, the weight of the existing attachments, the remaining strength of the poles, the pre-existing agreements, etc., to establish standards that apply to all parties equally.

A. "Non-discriminatory access" must mean similar access under similar circumstances, in light of all the facts

Contrary to some cable companies and CAPs, who desire to impose a broad interpretation of the term "non-discriminatory," the phrase should be read as prohibiting unreasonable discrimination.²¹ As Virginia Power observes, "non-discriminatory" in the context of regulated services is a term of art that has come to mean treating similarly situated persons in a similar manner. Non-discriminatory treatment does not guarantee equality of results, but merely requires the consistent application of appropriate principles and guidelines.²²

By focusing on the underlying intent of section 224(f) -- the prevention of unreasonable discrimination -- the FCC will be able to craft balanced, workable, and properly flexible guidelines. The Infrastructure Owners also point out that "non-discriminatory access" should mean that similarly-situated entities seeking to attach to the identical utility infrastructure under substantially similar circumstances are afforded access based on an impartially applied set of criteria²³

²¹ ACSI, p. 8; GCI, p. 4; GST; Joint Cable Comments, p. 13; MFS, p. 9; NextLink, pp. 5-7; and NCTA., pp. 4-5.

²² Virginia Power, p. 5.

²³ Infrastructure Owners, p. 11.

UTC and EEI concur with ConEdison that under the "nondiscriminatory access" standard, a utility must be permitted to make reasonable decisions based on the circumstances of the attachment.²⁴ For instance, Con Edison notes that providers can be expected to seek to attach different technologies to different points of the utility's system; they will request different rights for different durations for varied operations and technologies; and there will be differing levels of risk to the utility by each type of attachment. The FCC should permit differing terms and conditions for attachments where they are attributable to the circumstances of the proposed attachment. For example, a provider requesting to attach to 50 poles in a remote area of ConEdison's service area is not making the same request as a provider desiring to attach to critical facilities in the central financial district of New York City. The risks involved in these situations are not comparable nor is the risk of outage or operating difficulties resulting from congestion the same, nor is the level of potential claims in the event of an outage or other operating problem. "Nondiscriminatory access" should be reasonably and fairly interpreted to accommodate differences in circumstances and operating environments.²⁵

Contrary to the assertions of the Joint Cable Commenters, the Act does not compel, or even allow, the FCC to deem all poles and conduits suitable for attachments.²⁶ Access determinations must be made on a facility-by-facility, case-by-case basis. It must be re-emphasized that just because access has been afforded to some facility does not mean that it must be afforded to all facilities. In instances where a utility has not

²⁴ ConEdison, p. 5.

²⁵ ConEdison, p. 5.

²⁶ Joint Cable Comments, p. 14.

provided any access to a pole, duct or conduit for an attachment to provide cable or other telecommunications service, the Act's access provision simply cannot be triggered -- there can be no unreasonable discrimination if no one is allowed access. Similarly, attachments used for purely internal utility communications (including fiber networks used to manage and coordinate the safe and reliable provision of utility service) must not trigger an access obligation, because internal communications facilities pose no economic impediment or other hindrance to competition or market entry by telecommunications service providers. This is yet another instance where the FCC's requirements must distinguish between LEC pole owners and electric utility pole owners.

B. Consideration of similar access based on similar uses must reflect legal restrictions on easement use

UTC and EEI strongly object to the suggestion by some commenters that the FCC should construe the new pole attachment provisions as requiring access to facilities not owned by the utility or contemplated under the Act. For example, ALTS suggests that the FCC should require access to all poles, ducts, conduits, and rights-of-way, including building risers, vault access and building entrance facilities, "regardless of how the legal title over such facilities is held."²⁷ Similarly, NextLink argues that the FCC rules should guarantee access where a utility has a right of entry agreement, an easement or governmental franchise.²⁸ Winstar requests access to utility rooftops.²⁹

²⁷ MFS, p. 7 (emphasis added).

²⁸ NextLink, p. 4.

²⁹ Winstar, p. 6.

The Act speaks in terms of poles, ducts, conduits and right-of-way owned or controlled by the utility; it does not contemplate access to any and all utility facilities or facilities for which utilities do not have legal control. UTC and EEI noted in their Joint Comments that the underlying rights of property owners may prevent certain facilities from being used as desired by a potential attaching entity, or as US West succinctly puts it, a utility “cannot grant what it does not have.”³⁰

Electric utilities do not routinely own building riser or building entrances and have little control over the use of such space beyond the installation and maintenance of electric facilities.³¹ For example, easements granted to utilities by private property owners may strictly limit the permissible uses of those easements. A common form of such restriction is one that allows an electric utility the use of an easement only for the delivery of electricity. Similar limitations also arise from state law regarding the use of rights-of-way, howsoever obtained (*i.e.*, purchase or condemnation).

UTC agrees with BellSouth and NMPS that the FCC should clarify that a LEC’s duty to provide access does not relieve the requesting party of its obligation to obtain appropriate authority to provide the service which is carried over cable and wire facilities and to obtain permission where necessary from any third party, public or private, having a property interest associated with the particular pole, conduit, duct or right of way.³²

³⁰ US West, p. 14.

³¹ With regard to Winstar’s rooftop request, this is simply beyond the scope of the current rulemaking. It would appear that this request is more appropriately covered, if at all, under the FCC’s proceeding related to co-location and interconnection to LEC facilities.

³² BellSouth, p. 14; and NMPS, p. 21.

Further, UTC fully supports BellSouth's recommendation that, within the range of pole attachments covered by Section 224, the term "right-of-way" under the 1996 Act means only the public rights of way that have been historically granted by franchising authorities to public utilities. The term right-of-way for the purposes of Section 224 should not extend to private easements acquired through negotiations with private property owners.³³ Such a clarification would also be consistent with the Joint Cable Commenter's statement that "[p]oles represent social resources established as a public trust..."³⁴ Private easements and rights-of-way, acquired through private negotiation and without resort to eminent domain powers peculiar to utilities, are not "social resources," but instead represent significant investments by utility ratepayers and shareholders that must not be used to subsidize cable companies or new telecommunications entrants.³⁵

C. Commenters overwhelmingly recognized that there are clear and legitimate bases for distinguishing conditions of access to utility facilities

Despite the efforts of the Joint Cable Commenters and NCTA to downplay the significance of section 224(f)(2), the overwhelming majority of commenters acknowledge that Congress explicitly recognized that utilities in particular have valid reasons for

³³ BellSouth, p. 14.

³⁴ Joint Cable Comments, p. 7.

³⁵ Even though franchised cable television systems have been granted the right, under Section 621 of the Communications Act of 1934, as amended, to use public rights-of-way and easements which have been dedicated to "compatible uses," no such right has been provided to telecommunications carriers. In any event, courts have construed Section 621 very narrowly in order to avoid an unconstitutional "taking" of private easements which have not been formally dedicated to public use. See, e.g., *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F2d 600 (11th Cir. 1992).

denying access due to safety, capacity, reliability and generally applicable engineering principles.³⁶

UTC and EEI join with the Infrastructure Owners in urging the FCC to refrain from adopting specific standards governing the permissible reasons for utility denial of access. Instead, the FCC should adopt general principles that would allow the utility to establish the specific criteria for denial under each of the four access exceptions. As the Infrastructure Owners correctly point out, such an approach would recognize the fact that standards of safety, capacity, reliability, and generally applicable engineering practices vary greatly among utilities, and among the types of infrastructure subject to the Act.³⁷

1. National codes, state requirements, and local utility practices regarding safety, reliability, and engineering all bear on whether access can be reasonably denied consistent with section 224(f)(2)

In adopting section 224(f) Congress specifically recognized the unique safety and operational issues associated with electric utility facilities. As ConEdsion notes, in allowing telecommunications carriers access to utility facilities, the FCC must understand that provision of electric service is inherently dangerous. Individuals working in close proximity to live electric cables need to be properly educated in working in that area.

The Joint Cable Comments tacitly acknowledge the safety considerations of working in and around electric utility facilities by suggesting the use of the National Electric Safety Code (NESC) as a standard for assessing the reasonableness of denying

³⁶ As indicated in the Joint Comments of UTC and EEI, the FCC should adopt similar reasons for denial of access for gas utilities.

³⁷ Infrastructure Owners, p. 19.

access.³⁸ However, their suggestion that NESC should be the only standard is far too limiting. The NESC is just one of many recognized codes and safety standards that needs to be considered by electric utilities.³⁹ Other applicable safety standards include the National Electrical Code, Occupational Safety and Health Administration (OSHA) requirements, state and local safety and facility regulations, and owner-specific standards which reflect design and operational practices, local weather extremes, and local public activities.

Finally, it should be noted that the NESC and OSHA requirements only spell out minimum safety levels. They do not establish or take into consideration all of the local or special issues associated with each pole or conduit use. The Commission's regulations should acknowledge that more stringent safety requirements are not *per se* unreasonable, contrary to the suggestion by the Joint Cable Comments. The FCC's rules should foster and promote safety standards for the protection of communications workers, electric company workers, and the public.

2. There are no specific standards which could be used to determine in advance for all facility owners when there is "insufficient capacity" to permit access

In responding to the FCC's inquiry on specific standards for determining when an electric utility has "insufficient capacity" to permit access, several cable companies and CAPs appear to take the position that there is no such thing as insufficient capacity. For

³⁸ Joint Cable Comments, p. 17.

³⁹ In fact, Section 1 of the NESC specifically states: "This code is not intended as a design specification or as an instruction manual."

example, the Joint Cable Comments, in a blatant attempt to rewrite the Act, state that capacity can always be added by putting in larger poles or placing inner duct inside utility ducts and conduits.⁴⁰ The Joint Cable Comments state that the FCC should not “cap” the number of attachments on a utility facility but instead should rely on economic realities to limit the number of attachments.⁴¹ GST makes similar statements regarding the ability to increase capacity “at will.”⁴² Not to be outdone, NextLink even suggests that utilities be required to place additional poles in right-of-way if there is no capacity available on an existing pole.⁴³

In addition to ignoring the plain fact that Congress expected there to be reasonable recognition of limits on utility capacity by referring to it in the statute, the suggestions of these cable companies and CAPs that capacity is virtually unlimited is naive at best and fraudulent at worst. Clearly there are capacity restraints on accessing utility facilities that were specifically obtained, designed and constructed for purposes unrelated to the requested attachments. Larger facilities will have a direct cost on many other facets of utility operations that were specifically tailored to existing utility facilities. For example, taller poles may require the purchase of higher bucket trucks, retraining of operations and maintenance staff, and additional maintenance/administration expenses. Taller poles may also exceed local zoning and height restrictions.

⁴⁰ Joint Cable Comments, p. 16.

⁴¹ Joint Cable Comments, p. 22.

⁴² GST

⁴³ Nextlink, p. 6.

As pole owners, utilities bear the brunt of negative community opinion as a result of the “urban blight” of multiple attachments -- a public relations issue that utilities cannot afford in an increasingly competitive utility environment. Despite the Joint Cable Comments’ predictions to the contrary, there is considerable reason to believe that there will be some amount of relatively significant facility overbuild, entailing multiple telecommunications attachments, before the inevitable “market correction.” In this situation the utility and its ratepayers will then be left stranded with the additional costs of facilities that are abandoned by over optimistic telecommunications competitors.

Available capacity must be measured by reference to codes, standards, or regulations that define whether there is sufficient space, safety, or strength today. Moreover, because facility owners often have constructed reserve space, and/or facilities of increased strength, to accommodate their own planned facility expansion, such reserved space should not be required to be included in the calculation of available capacity. Accordingly, EEI and UTC renew their recommendation that the availability of capacity be made on a case-by-case basis by the utility. The fundamental point is that the 1996 Act only requires nondiscriminatory access. It does not require facility owners to build facilities for and provide access to any and all entities requesting to attach.

3. It is not possible to specify, or even require, a minimum or quantifiable threat to reliability before a utility may deny access.

In response to the FCC’ question regarding the appropriate determination of what constitutes a minimum threat to reliable utility service, the Joint Cable Comments suggest

that any concerns about reliability are satisfied by adherence to NESC and that any demands for stricter standards than the NESC should be presumed unreasonable. The Joint Cable Comments go on to suggest that the FCC “must watch for the tendency of utilities to invoke “safety and reliability” as a mantra to disguise naked discrimination.”⁴⁴ The Joint Cable Commenters suggest that there should be no presumption that electric conduits are subject to any technological impediments to joint use. Finally, in a particularly outrageous statement the Joint Cable Comments recommend that utilities should not be permitted to use “unnecessary” engineering requirements to consume available pole space.⁴⁵

UTC and EEI vehemently oppose the Joint Cable Commenters cavalier efforts to second-guess utility determinations as to what is required for safe and reliable electric service. The Joint Cable Comments are without any support, and evidence a complete lack of regard or appreciation for the legitimate requirements of electric company operations.⁴⁶ As indicated earlier, the NESC is but one of many guides that should be consulted to ensure safety. Moreover, safety is only one component of reliable utility service. NMPS correctly points out that electric utilities have been in the business of providing reliable power for over a hundred years, and are constantly learning new and better ways to reliably serve the public.⁴⁷

⁴⁴ Joint Cable Comments, p., 17.

⁴⁵ Joint Cable Comments, p. 18.

⁴⁶ It is particularly ironic that the cable industry, which is renowned for its poor customer service, is suggesting what constitutes minimum standards of reliable electric service.

⁴⁷ NMPS, p. 30.